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REPORT OF COMMITTEE ON REFORM OF JUDICIAL PROCEDURE.*

At the last meeting of the Virginia State Bar Association there was adopted without comment and without dissent, the following resolutions:

"Whereas, It is important that Virginia should take a positive stand with reference to the present active propaganda looking to the reform of pleading and procedure and that a report, together with all such recommendations as may appeal to the Committee as pertinent be made to the next annual meeting of this Association;

"Be it Resolved, That the President-elect of this Association be, and he is hereby authorized to appoint a Committee to be composed of five members of this Association to be known as the "Committee on Reform of Judicial Procedure," the duties of which shall be:

"First, to report, as far as practicable, to this Association at its next annual meeting, the history of such reforms as have been put into effect in other States and as are being considered by the American Bar Association and the various State Bar Associations and to make recommendations regarding the same:

"Second, To make specific recommendations with reference to the present system of pleading and procedure in effect in the State of Virginia, looking to the improvement thereof."

Shortly thereafter President Lile designated the personnel. Before any organization could be effected the committee was deprived by death of the invaluable aid and advice of that profound scholar and experienced jurist, Honorable Archer A. Phlegar. The four remaining members respectfully beg leave to report as herein follows:

So extensive have been the efforts at simplifying, cheapening and expediting judicial procedure during the last twelve months that it is no longer practicable to furnish within the legitimate confines of a committee report an intelligent history of the reforms that are being considered. Dealing with results, however,

*Virginia State Bar Association, Hot Springs, Virginia, 1913.

will not be without interest to those members of the Bar who have at heart the re-establishment of the confidence of the public. This has been the keynote of the many able discussions and papers. Principles and not forms have been sought. The great majority of lawyers care not for form so long as simplicity, expedition and economy are attained and the law is enforced through fixed rules of procedure. Indeed, the law would be worse than meaningless if left to unfettered individual inclination. One of the significant and wholesome signs of the times is the unselfish spirit displayed by the lawyers in the nation wide effort to reform judicial procedure.

STRONG MORAL SUPPORT.

Bound by a conservatism that has always distinguished the lawyer and an aversion to depart from long established customs and usages, the avidity with which the new era of juridical relations is being entered upon would appear marvelous, if one be unmindful of a certain unrest in political and economical circles and did not perceive the foundation of a great principle underlying it. It was less than a decade ago that complaints of procedural inefficiency attained the dignity of demands. It was at this time that its study and public discussion was seriously undertaken in a manner that has aided greatly in the crystalization of ideas into a settled national program that is being adopted by the States. The secret of popularity of the plan is that form is sacrificed for principle and a centralized agency is provided duly qualified and capable of prompt and final action, upon which lawyers and judges can impress their convictions with suggestions. This is the first organized propaganda looking to a fixed result. Previous efforts seem to have spent themselves in disagreements over forms or systems and nothing except a few amendments was accomplished. A condition precedent to success was the removal of that rock upon which progress has been so consistently shipwrecked. It has been done. While this campaign was progressing and about two years ago, students of governmental relations, and particularly Ex-president Taft, sounded an alarm that has been heeded. The distinguishing feature of his administration was a consistent official appeal to both Congress and the public. It became obvious that unless judicial procedure

was speedily reformed by the Bench and Bar it would be done by persons more zealous than competent and possibly more selfish than patriotic. The love of the general welfare has proved strong enough to draw the rock-ribbed conservative from his ancient moorings. Seeing about him the spirit of unrest and criticism that threatened danger, he sacrificed long cherished inclinations in the hope or reincarnating the old time love and veneration for the Courts believing that the average man is a good loser under the convictions of square and unprejudiced rulings and a trial free from technical handicaps. Like James Russell Lowell, there seems to have come to him the troubled thought that

> New times demand new measures and new men;
> The world advances and in time outgrows
> The laws that in our Father's day were best.
> * * * * * * * *
> The time is ripe, and rotten ripe, for change;
> Then let it come.

Or, like Mr. Justice Holmes in a very recent utterance to the Harvard Law School Association of New York

"We too need education in the obvious—to learn to transcend our own convictions and to leave room for much that we hold dear to be done away with short of revolution by the orderly change of law."

And, so, all over the State and the Nation the grizzled warriors of the Bar have given freely of their advice, when they have not actually led, until there has been chrystalized into a fixed and meritorious program the many efforts to reform judicial procedure. Mingling their leaven with the militancy of the enthusiast has produced a fixed program and a single principle, a middle ground between two violent extremes, the merit of which has called forth the unanimous and active support of the American Bar Association; the Conference of Commissioners of Uniform State Laws; the Executive Committee of the Association of Law Schools of the United States; the National Civic Federation and over forty Governors and State Bar Associations. Ex-president Taft, in so many words, urged it upon Congress in his farewell message; President Wilson, in writing, has authorized the statement of his entire approval, and the Chair-

man of the two Judiciary Committees of Congress have each introduced the necessary bill as regards the inferior Federal Courts. In the campaign are co-operating such great teachers as Dr. Roscoe Pound of Harvard; Dr. Henry Wade Rodgers, Dean Wm. R. Vance and Dean Wm. M. Lile, the honored President of our own Association.

If there had been any doubt about its success it was dispelled when commerce enthusiastically enrolled itself in the campaign. The National Association of Credit Men at Cincinnati at the convention held in June, adopted a set of resolutions that have been appended to this report. In July, the Executive Committee of the Chamber of Commerce of the United States in meeting at Sacremento, California, did the same. That means that commerce and society have enlisted under the banner of the lawyers and we are going along together. It means harmony; it means peace for where there is confidence there can be no discord.

COURTS AND LAWYERS FREE.

It means simply that the detail machinery of the Courts both Federal and State, shall be prepared and kept up to date by the highest appellate court, assisted by the Bench and Bar and not by the Legislative department of the Government, as is now the case. This is necessary to the preservation of a due balance between the three departments of government and is in harmony with the basic principles of our constitution and the spirit of our republican institutions.

The Courts have been charged with incompetency and the lawyers with indifference regarding a situation they did not create and are helpless and almost hopeless to alter. The concomitant of responsibility in any relation is the power and facility to properly perform the required duty. If the Bench and Bar are to be held responsible for the results of Court procedure they should be allowed to prepare and perfect that procedure, the Legislature retaining control over all jurisdictional and fundamental matters. This delicate task is one for experts, trained in the nicities of the law and the scientific manner of its proper enforcement and not for Legislators, however earnest and conscientious they may be. One might as well expect a board of directors to build and operate a locomotive.

Two Obvious Reasons.

But, even if the Legislative department were equally competent, there are two other insurmountable objections, in Virginia, duly evidenced by annual reports to this Association. The short biennial sessions do not afford the time necessary for the mature consideration and the labor required. Secondly, the system adopted should be susceptible of immediate alteration in response to the call of convenience or the demand of justice in order to put an immediate end to admitted hardships. We venture to assert that this one weakness had done more to prejudice the people against the Courts and lawyers than any other juridical element. Ignorance of this fact has enabled helplessness to be misconstrued into indifference. Let the light be turned on for "a lie may keep its throne a whole lot longer if it skulk behind the shield of some fair seeming name." But, apart from these personal considerations, the test of any permanent institution is its ability to adapt itself promptly to changing conditions. This applies with peculiar force to judicial procedure. It should respond promptly, economically and almost-automatically, and not be dependent upon legislative time, whim or lack of information. We are content to submit this position upon the record of failures by this Association and the American Bar Association to obtain legislative relief, under which this Bar Association has rested in silent resignation. The American Bar Association, through its faithful Committee of Fifteen has been for a decade knocking at the doors of a Congress, always ready to listen but seldom prepared to place even a few needed patches on the crazy quilt of federal procedure. The American Bar Association, by an unanimous resolution, has placed the responsibility at the door of Congress where it belongs and called upon a complaining country to seek relief where it may only be obtained. We respectfully recommend that Virginia shall follow that example.

Let the Supreme Court Make Rules.

With the power and the duty resting in the Supreme Court of Appeals that Tribunal, with such assistance as it may request of the Bar, could prepare and put into effect a complete, simple, economical, expeditious and correlated system of rules for the

guidance and regulation of the trial courts. Having on writ of error and appeal a supervision over the conduct of these courts, any hardship or irregularity could at once be seen and the rules changed so that there may not be a recurrence. There would be no long legislative delays and general discussions and contentions without a responsible head to make a final decision. And this is a merit not to be underrated. Lawyers and Judges would file their suggestions with argument and circumstances in support of a change, confident that the controversy would be orderly, scientifically and finally settled. It is difficult to conceive of anything more prejudicial to the standing and dignity of the Courts than a constant lobbying for legislative relief against hardships of the legislature's own making.

Power Easily Recalled if Abused.

If objection be made to this delegation of authority by those who do not distinguish between the fundamental questions of the jurisdiction and power of the Courts and the detail matters of the machinery through which they operate, the answer is that the Legislature gave and the Legislature can take away. It is one recall, however, that is not to be feared. With an eye single to the usefulness of the Courts, with a determination to excel as their ancestors have done before them, there need be no apprehension as to the result of the concerted efforts of Virginia Judges and lawyers once they set about to achieve a result.

The American Bar Association's Campaign.

At the instance of the American Bar Association, a bill has been introduced in Congress known as the "Clayton Bill," vesting the necessary power in the Federal Supreme Court to reform the law side of the inferior Federal Courts. It is in these words:

"The Supreme Court shall have the power to prescribe, from time to time and in any manner, the forms and manner of framing and filing proceedings and pleadings; of giving notice and serving process of all kinds; of taking and obtaining evidence; drawing up, entering and enrolling orders; and generally to regulate and prescribe by rules the forms for the entire pleading, practice and procedure to be used in all actions, motions, and proceedings at law of whatever nature by the district courts of the United States."

The Supreme Court has always possessed this power over the equity side and, in response to a public demand officially voiced by President Taft, exercised it to the satisfaction of a grateful Bar and public. There is a nation wide campaign in that behalf being conducted. In its interest there has been arranged to meet at Montreal on August 30th a "Conference of Judges," the first in the history of the United States. It will be composed of the presiding Judge of the Highest Appellate Court of each State, the senior Circuit Judge of each Federal District and the Chief Justice of the Court of Appeals of the District of Columbia, or an alternate. Over fifty of these great jurists have accepted. It is significant of the new born but determined purpose to re-establish the Bench and Bar in the faith, esteem and gratitude of the people, that these big hearted, broad minded jurists and statesmen are active and earnest participants. It can be authentically stated that more than a majority of each House of Congress, as well as the President and the Chairman of the two Judiciary Committees are committed to the program that Congress shall set the Supreme Court free.

So, it is seen, that instead of wasting time in wrangling over the form that judicial procedure should take, a status that would have further weakened the faith of laymen in lawyers and judges and put farther away the practical results to be attained, the lawyers of the American Bar Association unanimously adopted the plan of having the Federal Supreme Court prepare the system. This carried with it the idea of court rules as to details and legislative control of fundamental and jurisdictional matters. This plan, known as the "intermediate system" has been endorsed by every State Bar Association that has considered it and it is earnestly recommended to the favorable consideration of this Association.

UNIFORMITY OF JUDICIAL PROCEDURE.

Now, it being in the interest of economy and the orderly administration of justice there ought to be uniformity amongst the States and in State and Federal practice, whenever actual uniformity can be brought about. Of all elements entering into judicial procedure this stands second to none save the reform it-

self. There is no more justification to be found in the use of differing languages than in the prevelence of differing Court procedure amongst the States. Now, uniformity is made entirely practical and sensible, as to equity procedure, by the simple adoption altered to suit local conditions of the new equity rules presently in effect in the inferior federal courts. Virginia would offer an example, as she has so often done before, that would as surely be followed as the day follows the light. Time has been had to give them a fair test. They are certainly in the interest of simplicity, expedition, economy and justice. It is doubtful if any member of this Association is ready to suggest a better, maturer or simpler system of rules. There is hardly one member satisfied with conditions in equity procedure as they presently exist in Virginia. Two great objects may thus be attained with one effort—reform and uniformity. These rules need no defense but it is permissible to remark that they represent the mature thought and profound knowledge of the greatest Court in the world aided by suggestions invited from and freely given by thousands of thoughtful, practical lawyers all over the United States. Our own Court would see to it now and in the future that all necessary changes were made to fit local conditions. Therefore, the adoption of these rules is earnestly recommended.

THE COMMON-LAW SIDE.

Whether a new system of rules shall now be prepared for the common-law side or, for the sake of uniformity, the new rules to be prepared by the Federal Supreme Court shall be awaited the Committee, at this time, ventures no recommendation. The question is presented for the immediate consideration, its importance demands. Certainly, it should be seen to that the Supreme Court of Appeals is possessed of all necessary statutory power. It would also serve a useful purpose to have in the possession of this Association a compilation and analytical examination and codification of the statutes and decisions controlling all jurisdictional and fundamental matters with appropriate recommendations. This is a serious task and one that should not be lightly undertaken.

VIRGINIA LAW.

What is necessary to be done for the practical consummation

of these suggestions, if adopted. Do the statutes as they now stand justify immediate action by the Supreme Court of Appeals? There is no judicial interpretation to be found. Section 3112 of Pollard's Code reads as follows:

"Section 3112. Court of appeals may prescribe forms of writs and regulate practice of courts.—The Supreme Court of appeals may, from time to time, prescribe the forms of writs and make general regulations for practice of all the Courts; and may prepare a system of rules of practice and a system of pleadings, and the forms of process, to be used in all the courts of this State; and when the same are prepared, the Court shall make report thereof to the General Assembly, in order to further legislation in the premises. (Code 1849, p. 625, c. 161, § 4; 1869-70, p. 365.)"

The words "*And when the same are prepared the Court shall make report thereof to the General Assembly in order to further legislation in the premises,*" without a strained construction, could have reference to jurisdictional and fundamental alterations that might then be considered necessary. Since, however, a session of the Legislature is conveniently close upon us, instead of inviting opinions of the members of the Association before the preparation of this report, it is respectfully recommended that the Association shall request of the next Legislature that § 3112 be amended by omitting the words: "*In order to further legislation in the premises*" and by inserting the words, "*and put into effect*" just after the word "*prepared*" and just before the words "*the court.*"

The History of the Other States.

It will not be without interest and probably necessary in connection with our recommendations to observe the manner in which other States are working. New Hampshire seems to have acted through its Supreme Court without the intervention of a Committee but with the aid of suggestions from the Bar. Connecticut acted through a Commission selected by the State Bar Association and authorized by the Legislature. The Courts seem to have played no official part. It followed closely the English plan even to the preparations of forms omitting, of course, all fundamental and jurisdictional matters, some of which occupy

a conspicuous place in the English system. It adopted what is known as the "intermediate procedural system" which is meeting with universal approval as heretofore pointed out. All fundamental and jurisdictional matters are controlled by the Legislature through a "Practice Act" specially prepared and all details of practice are regulated by rules of Court. These details consist of some that regulate minute and other highly important matters of practice. There are a few that could with benefit and propriety be left to the discretion of the Court. The others should be regulated by fixed rules prepared by the Supreme Court. It will be observed that this lies midway between the two extremes of (1) regulating all judicial procedure by Court rules and (2) regulating all of it by statute. It is a logical, practical and expedient division of power. Without recommending it in detail the principle involved appeals as being the strongest, safest and most endurable.

In Alabama the work seems to rest with the Bar Association and a commission appointed by Governor Emet O'Neil. While the Courts have no official part they cooperate as individual members. This first step was taken on May 10th, 1912 and seems to have progressed to a permanent organization sub-divided into appropriate Committees to which were submitted all recommendations and suggestions. Whether this Commission will continue the preparation of an entirely new system of rules or will adopt the new Federal System is to be considered. The latter course seems certain. Something of a sensation was created by the announcement of the Supreme Court of Alabama of its adoption of the rule of reversal for prejudicial error only. It is an interesting fact worthy of note that Congress has been considering this question for six years.

The New Jersey procedure was reformed by a Commission appointed by the Bar Association in June, 1911. It was confronted by constitutional questions that confined its work entirely to questions of pleading and procedure. Its distinguishing feature is a short supplement to the Practice Act with rules of Court and Forms greatly simplifying procedure in Courts of Law. The Legislature enacted it in March, 1912.

Colorado set an example for progress. The subject was mooted

in July, 1912, and referred to an appropriate Committee. The enabling act was passed by the Legislature in December. The Bar Association on July 10th endorsed suitable recommendations to be made to the Supreme Court. The enabling act is objectionable in that it permits trial courts to make some rules. It reads:

"The Supreme Court shall prescribe rules of practice and procedure in all Courts of record and may change or rescind same. Such rules shall supersede any statute in conflict therewith. Inferior Courts of record may adopt rules not in conflict with such rules or with statute."

But, the most significant reform and the only other that time permits us to discuss is that of the State of New York, the birthplace of the widely discussed Code Procedure. There had gradually grown up a rigid statutory unrelated mass of Code of detail that left absolutely no discretion or iniative to the Court or the lawyer. It now fills three large volumes. It was the natural outcome of such an artificial status and has fulfilled the prediction of its author that it woud keep the Bar in "perpetual trouble." Judge Parker, Mr. Root and Mr. Hornblower called it a "legal monstrosity," "procedure run mad" and "a thoroughly vicious piece of work." In 1912 the Legislature created what is known as the "Board of Statutory Consolidation." Its members were recommended by the Bar Association. In December, 1912, it presented a plan for the "classification, consolidation and simplification of the civil practice in the Courts." That report is now being considered. It follows in all respects the "intermediate procedural system." Their report would indicate that each Court would make some of its own rules. This is a serious weakness and one that will no doubt be corrected. Uniformity alone would demand that the rules be made by the Supreme Appellate Court. Trial Courts should not make rules for its own guidance. It is appropriate to point out that the Court rule system has proven successful in England, the Federal Courts, Massachusetts, Connecticut, New Hampshire and New Jersey. It will soon be in use in not less than ten other of the leading states of the Union and is being considered in all the others.

Lawyers being specialists, their view of any constructive matter is naturally personal; but lawyers being citizens know how

to sacrifice their personality for the common good. This duty, privilege or power, as you please, must rest somewhere. Could it find a better, more appropriate or more logical lodgment than in the highest appellate court of a State or nation? There has been but one answer and it solves the problem. So, in order to reform judicial procedure, it is not necessary to be revolutionists or experimenters or seekers after innovation. Mr. William B. Hornblower, in successfully advocating the new system for New York, has concisely expressed it in words applicable to this State:

"There is nothing in the constitution which takes from the Courts the power to regulate judicial proceedings by rules of Court and this power has been exercised since the establishment of the State Government. We adopted the common law of England, under which the adjective law was almost entirely of judicial origin, inherited the power thus exercised and have continued to apply it except as restrained by the legislature. Under the principles of the common law and by rules of Court, Judge Doe worked out his radical reforms in the procedure of New Hampshire and the power to regulate the details of practice should be restored to the Courts where it originally resided." (Owen *v.* Weston, 63 N. H. 603.)

In Virginia we have drifted along modifying by statute the common law system that was long since repudiated by England. The question is shall we be content with this rejected thing patched with a hundred exceptions or shall we provide our Courts with a scientific correlated system of pleading and procedure? Shall we take the iniative fearlessly, with a keen sense of a duty inherited with an enviable legal history, or shall we await the duress of an inevitable popular demand?

We respectfully recommend the adoption of the following resolutions:

First: That the Supreme Court of Appeals, in pursuance of the authority vested in it by Section 3112 of Pollard's Code, when amended as herein provided, be respectfully requested to prescribe by suitable rules the forms of writs and make general regulations for the practice of all the Courts both law and equity; and that it will prepare a system of rules of practice and a system of pleadings and the forms of process to be used in all the Courts of this State:

Second: That the Virginia State Bar Association, having in view the advantages to be gained by conformity with the Federal

Equity Practice, respectfully commends the same to its consideration:

Third: That the next Legislature of Virginia, in order to carry out the purposes of this report and of this resolution be and it is hereby requested to amend Section 3112 of Pollard's Code in the following particulars, that is to say: insert the words *"civil and criminal"* after the words *"and put into effect"* just after the word *"prepared"* and just before the words *"the Court,"* and strike out the words *"in order to further legislation in the premises"* and substitute therefor the words *"in order that they may be published in the acts of the current session,"* adding the usual phrase repealing all provisions of the law in conflict therewith or with the rules of practice and procedure that may be adopted by authority hereof.

Fourth: That the President of this Association shall forthwith designate a suitable Committee to urge upon the General Assembly the legislation proposed by these resolutions.

Respectfully submitted,

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